

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRBa0115/1dn
DAK:jld:jf

February 9, 2005

To Representative Wasserman:

In general, the privacy protections in s. 51.30, stats., are at least as stringent as, or more stringent than, those of the regulations (known as the Privacy Rule, 45 CFR parts 160–164), issued under the Health Insurance Portability and Accountability Act of 1996 (HIPAA). However, for release of treatment records without the patient's informed, written consent, under the circumstances encompassed by s. 51.30 (4) (b) 13., stats., under current law and as that statute is renumbered s. 51.30 (4) (cm) and amended under the bill, the Privacy Rule is more stringent. Under 42 CFR 164.510 (Uses and disclosures requiring an opportunity for the individual to agree or to object), are the following provisions:

“164.510 (b) Standard: uses and disclosures for involvement in the individual's care and notification purposes.

(1) Permitted uses and disclosures.

(ii) A covered entity may use or disclose protected health information to notify, or assist in the notification of (including identifying or locating), a family member, a personal representative of the individual, or another person responsible for the care of the individual of the individual's location, general condition, or death. Any such use or disclosure of protected health information for such notification purposes must be in accordance with paragraphs (b) (2), (3), or (4) of this section, as applicable.

(2) Uses and disclosures with the individual present. If the individual is present for, or otherwise available prior to, a use or disclosure permitted by paragraph (b) (1) of this section and has the capacity to make health care decisions, the covered entity may use or disclose the protected health information if it:

(i) Obtains the individual's agreement;

(ii) Provides the individual with the opportunity to object to the disclosure, and the individual does not express an objection; or

(iii) Reasonably infers from the circumstances, based on the exercise of professional judgment, that the individual does not object to the disclosure.”

This amendment requires that disclosure of treatment records be in accordance with 45 CFR 164.510 (b) (1) (ii) and (2). “Family member” is not defined under the Privacy

Rule, but it seems relatively clear that these provisions are applicable to the parent, child, sibling, or spouse and are applicable to mental health professionals, under s. 51.30 (4) (cm).

However, I'm not sure if those provisions are applicable to the law enforcement officer who is provided access under s. 51.30 (4) (b) 13., stats., in current law. It is possible that what would apply to the law enforcement officer is 45 CFR 164.510 (a) (3):

“164.510 (a) (3) *Emergency circumstances.* (i) If the opportunity to object to uses or disclosures required by paragraph (a) (2) of this section cannot practicably be provided because of the individual's incapacity or an emergency treatment circumstance, a covered health care provider may use or disclosure some or all of the protected health information permitted by paragraph (a) (1) of this section [a directory that gives name, location in the facility, general condition, and religious affiliation] for the facility's directory, if such disclosure is:

(A) Consistent with a prior expressed preference of the individual, if any, that is known to the covered health care provider; and

(B) In the individual's best interest as determined by the covered health care provider in the exercise of professional judgment.

(ii) The covered health care provider must inform the individual and provide an opportunity to object to uses or disclosures for directory purposes as required by paragraph (a) (2) of this section when it becomes practicable to do so.”

After speaking with Joe Hoey, I also included reference to 45 CFR 164.510 (a) (3) in the amendment.

Note also that, because the Privacy Rule requires that the patient be, in most circumstances, given an opportunity to object, the last sentence of the former amendment has been deleted.

Please let me know if I can provide further assistance with this amendment.

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